

**UNITED STATES DISCRICT COURT  
DISTRICT OF MASSACHUSETTS**

<b>IN RE: NEW ENGLAND COMPOUNDING</b>	)	
<b>PHARMACY, INC.</b>	)	
<b>PRODUCTS LIABILITY LITIGATION</b>	)	<b>MDL No:</b>
	)	<b>Dkt No. 1:13-md-2419</b>
<b>This Documents Related to:</b>	)	
<b>Tyree, 1:13-cv-12479 (RWZ)</b>	)	

**PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS**

Plaintiff Philip Tyree filed suit naming, among others, the Defendants who filed the pending Motion. Plaintiff raised product liability claims against the stated Tennessee Defendants (*See Document 1, Count V, Pages 32-24*). Mr. Tyree at all material times lives in Kentucky.

Counsel for the moving Defendants requested the deposition of Plaintiff and his wife. By agreement, the parties noticed the deposition for Nashville, Tennessee. On December 22, 2015 Mr. Tyree appeared at 223 Rosa L. Parks Avenue, Nashville, Tennessee.

The deposition started at 10:06 a.m. and adjourned at 2:41 p.m. The deposition was to be continued once certain documents were produced. When those were provided to counsel, attorneys seeking to set the continuation of the deposition asked for certain dates. Undersigned counsel informed of a conflict on the requested date, and that neither he nor his client could appear. Defendants proceeded anyway. For the reasons set forth in the accompanying Memorandum of Law with Exhibits thereto, the Motion should be denied.

Respectfully submitted,

/s \_\_\_\_\_

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### **CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the CM/ECF system will be served electronically to the registered participants identified on the Notice of Electronic Filing and copies will be e-mailed or mailed via regular U.S. mail to those participants identified as unregistered this 3rd day of March, 2016.

/s/Mike Hugo

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DISTRICT OF MASSACHUSETTS**

<b>IN RE: NEW ENGLAND COMPOUNDING</b>	)	
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	)	
<b>This Documents Related to:</b>	)	
<b>Tyree, 1:13-cv-12479 (RWZ)</b>	)	

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS**

Plaintiff files the following Memorandum and states:

The Defendant’s Motion to Dismiss should be DENIED. As noted in the filed Response, the deposition of Philip Tyree was set by agreement and convenience of the parties in Nashville, Tennessee. Mr. Tyree lives in Kentucky. The deposition of Mr. Tyree was held December 22, 2015 and commenced at 10:06 a.m. (See Exhibit 1). Prior to doing so, Mr. Tyree (through counsel) produced voluntarily additional documents he had found that were responsive to prior requests.

During the deposition, counsel asked Mr. Tyree questions regarding medical care. Plaintiff testified that he had seen a doctor in Bowling Green, Kentucky. (See Exhibit 2, Transcript, Pages 154-156). As noted on the record, Tyree mentioned this doctor for the first time even to his lawyer.

The lawyers agreed that the deposition would be adjourned until the recently disclosed medical provider’s records were produced. (See Exhibit 3). All counsel had been working amicably until this point, and undersigned gave assurances that the request for the records would be expedited. Given that assurance, a HIPAA Release was not signed, nor was a Subpoena issued to the medical provider.

On January 13, 2016 the documents were produced – as promised – to opposing counsel. According to notes, on January 21, 2016, it was requested that the continuation deposition be scheduled. Counsel for Plaintiff wrote on January 27, 2016: “No way I can do 1/29 ... I'm here all day - my cell is 404.805.0226. I am happy to quickly set a date and time that will work for all. ”

Prior to January 29, 2016 Counsel for Tyree also picked up the telephone and spoke with Kaycee Weeter, counsel who had been enlisted to set the deposition. She was informed that Mr. Tyree worked full time in Kentucky and could not make a deposition without giving adequate notice – as she knew since she was present at the first deposition held December 22, 2016.

For some reasons known only to the Defendants, knowing full well that neither Mr. Tyree nor his counsel would appear, the deposition was set – and not where the parties had agreed to before, but instead in the offices of Defense counsel.

On Sunday January 31, 2016 attorney Kaycee Wheeler at 6:35 p.m. counsel emailed Tyree’s lawyer and asked that the case be dismissed.

On February 3, 2016, Tyree’s counsel wrote to Ms. Wheeler, reiterating prior discussions, and once again stating the obvious- that the unilaterally set deposition date did not work and posed a conflict to counsel and Plaintiff.

The argument that Mr. Tyree did not proceed with discovery is without merit and should be rejected. The Motion should be denied.

Defendant’s arguments relating to any claimed dismissal pursuant to Tenn. Code Ann. § 29-26-122 should be rejected.

Respectfully submitted,

/S \_\_\_\_\_

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I hereby certify that this document filed through the CM/ECF system will be served electronically to the registered participants identified on the Notice of Electronic Filing and copies will be e-mailed or mailed via regular U.S. mail to those participants identified as unregistered this 3rd day of March, 2016.

/s/ Mike Hugo

**In the Matter Of:**

NEW ENGLAND COMPOUNDING PHARMACY INC. PRODUCTS LIABILITY

---

**VIDEOTAPED DEPOSITION OF PHILLIP TYREE**

*December 22, 2015*

---



100 Mayfair Royal  
181 Fourteenth Street  
Atlanta, GA 30309  
404.847.0999

NEW ENGLAND COMPOUNDING PHARMACY INC. PRODUCTS LIABILITY  
VIDEOTAPED DEPOSITION OF PHILLIP TYREE on 12/22/2015

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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

IN RE: NEW ENGLAND COMPOUNDING :  
PHARMACY, INC; PRODUCTS : MDL No: 2419  
LIABILITY LITIGATION :  
: Master Dkt.  
: 1:13-md-02419-FDS  
THIS DOCUMENT RELATES TO: :  
: Judge Rya Zobel  
All Cases Identified in :  
Docket No. 1472-1 :  
:

VIDEOTAPED DEPOSITION  
OF PHILLIP TYREE

10:06 a.m.  
December 22, 2015

Branstetter Stranch & Jennings  
223 Rosa L. Parks Avenue  
Suite 200  
Nashville, Tennessee

Susan DeCarlo, RPR, CCR No. B-2125



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2 THE ORLANDO FIRM, PC  
3 BY: Mark Zamora  
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5 Suite 400  
6 Decatur, Georgia 30030  
7 404.373.1800

8 On Behalf of the Plaintiff Steering Committee:

9 BRANSTETTER, STRANCH & JENNINGS, PLLC  
10 BY: Benjamin Gastel  
11 The Freedom Center  
12 223 Rosa L. Parks Avenue, Suite 200  
13 Nashville, TN 37203  
14 615.254.8801  
15 beng@bsjfirm.com

16 On Behalf of the Tennessee Clinic Defendants:

17 GIDEON, COOPER & ESSARY  
18 BY: CJ GIDEON, Jr.  
19 Kaycee Weeter  
20 315 Deaderick Street, Suite 1100  
21 Nashville, TN 37238  
22 615.254.0400  
23 cjgideon@gideoncooper.com  
24 kweeter@gideoncooper.com

25 On Behalf of St. Thomas Health, St. Thomas West  
Hospital and St. Thomas Network:

BRADLEY ARANT BOULT CUMMINGS, LLP  
BY: Amy D. Hampton  
Roundabout Plaza  
1600 Division Street, Suite 700  
Nashville, TN 37203  
615.252.2379  
ahampton@babbc.com

Also Present: Michael Mitchell, Videographer



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NEW ENGLAND COMPOUNDING PHARMACY INC. PRODUCTS LIABILITY  
VIDEOTAPED DEPOSITION OF PHILLIP TYREE on 12/22/2015

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VIDEOTAPED DEPOSITION OF PHILLIP TYREE on 12/22/2015

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(Tuesday, December 22, 2015 10:06 a.m.)

THE VIDEOGRAPHER: This is disc  
number one in the videotaped deposition of  
Phillip Tyree taken in the matter of the New  
England Compounding Pharmacy, Inc., Product  
Liability Litigation. The deposition is  
being held at Branstetter, Stranch &  
Jennings on December 22nd, 2015, at 10:06  
a.m.

My name is Michael Mitchell and I  
am the videographer, and the Court Reporter  
is Susan DeCarlo.

Will all counsel please introduce  
yourselves.

MR. ZAMORA: I am Mark Zamora and I  
work for Mr. Tyree.

MR. GASTEL: Benjamin Gastel on  
behalf of the Plaintiff Steering Committee.

MS. HAMPTON: Amy Hampton on behalf  
of St. Thomas Health, St. Thomas Network and  
St. Thomas Hospital.

MR. GIDEON: CJ Gideon on behalf of  
Howell Allen Clinic and St. Thomas  
Outpatient Neurosurgery Center.

MS. WEETER: Kaycee Weeter on



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1 I'm sorry, but I thought that I was  
2 answering it.

3 BY MR. GIDEON:

4 Q. Well, I am not fussing at you.

5 A. That's okay.

6 Q. But I am going to ask you a third  
7 and final time.

8 A. Okay.

9 Q. I want to know the things you  
10 cannot do today that you were able to do on  
11 August 16th, 2012.

12 A. Well, myself I can do just most  
13 anything I did, but I just don't do it as well.

14 Q. All right. Now, the next thing,  
15 you said just a minute ago you have gotten some  
16 additional shots. Where did you get the shots  
17 and who administered them to you?

18 A. This last time I got them in  
19 Bowling Green.

20 Q. How recently?

21 A. Not too long ago.

22 Q. Epi --

23 A. It's just -- yes, just a few weeks  
24 ago.

25 Q. Epidural steroid injections?

1 A. No.

2 Q. What kind?

3 A. It's just shots. It's just to help  
4 my nerves. They give me a shot and they burnt  
5 the nerve a little to kind of get through the  
6 pain.

7 Q. Do you recall somebody talking to  
8 you about a radiofrequency ablation?

9 A. No, but I seen that in the doctor's  
10 office.

11 Q. Okay. Tell me what kind of  
12 treatment you got, then, that is a shot but also  
13 burns the nerve. I truly don't understand what  
14 you are talking about.

15 A. I don't understand it either.

16 Q. Well, who is the doctor?

17 A. It's a Filipino doctor and to  
18 honestly tell you, I can't pronounce his name but  
19 he done -- he done pretty good.

20 Q. Well, is he at the Medical Center  
21 of Bowling Green?

22 A. It's Intervention Pain Specialists  
23 of Bowling Green, I think is what it's called.

24 Q. Interventional Pain Specialists?

25 A. I think that that is the name of

1 it, yes.

2 MR. GIDEON: Mark, that has not  
3 been disclosed.

4 THE WITNESS: Because they did not  
5 know about it.

6 MR. ZAMORA: I am hearing it for  
7 the first time.

8 BY MR. GIDEON:

9 Q. How many weeks ago was it?

10 A. Just a few weeks ago. Nobody asked  
11 me so I did not tell nobody.

12 Q. A few weeks to some persons is  
13 three weeks, two weeks, a few weeks could be 15  
14 weeks ago. Give me more precision how long ago  
15 it was.

16 A. Just a few weeks ago. If I had  
17 where I could, I would get my paperwork and show  
18 you, but I don't have it with me.

19 Q. I'll ask you just one more time.

20 A. Yes, sir.

21 Q. Put a number on the few. Is it ten  
22 weeks or two weeks?

23 A. I would say that it's three weeks  
24 ago that I got my last one.

25 Q. And how many of these previously

1 A. No, I don't.

2 Q. Did you know that NECC was licensed  
3 to do business in Kentucky, too?

4 A. No, I did not know.

5 Q. All right.

6 MR. GIDEON: Okay. Mr. Zamora, I  
7 am going to adjourn until you can provide us  
8 with some additional records. We will go  
9 off the videotape and then we will enter  
10 into a stipulation with the Court Reporter.

11 MR. ZAMORA: That's fine.

12 THE VIDEOGRAPHER: Off the video  
13 record at 2:36.

14 MR. ZAMORA: We are going to talk a  
15 little bit -- she is going to type up some  
16 things that we are saying so you just sit  
17 tight. We are done with the questions for  
18 now.

19 (Off the record discussion.)

20 MR. GIDEON: This will confirm the  
21 agreement that has been reached between  
22 Mr. Zamora, myself and counsel for  
23 St. Thomas, including Ms. Puig, who  
24 consulted with us by telephone.

25 During the deposition of Mr. Tyree,



1 he identified relevant, very material  
2 services being provided by a pain clinic in  
3 Bowling Green.

4 Mr. Zamora had not heard of this  
5 provider previously. It appears that at  
6 least several episodes of care have been  
7 provided by what Mr. Tyree described as the  
8 Interventional Pain Clinic of Bowling Green.  
9 Mr. Zamora has agreed to get a release  
10 signed by Mr. Tyree, if at all possible, to  
11 identify the provider and to make an  
12 expedited request for all the records from  
13 that provider as well as asking his client  
14 is there anybody else like this too.

15 By virtue of that, I have completed  
16 all of my questioning except what may well  
17 be suggested by the records from the  
18 Interventional Pain Clinic, so our agreement  
19 is as follows:

20 My interrogation of Mr. Tyree is  
21 adjourned. Counsel for St. Thomas has not  
22 yet had an opportunity to ask a single  
23 question. We will reconvene as soon as we  
24 can do so. But if we cannot, A, get the  
25 records, and, B, convene reasonably on or

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[mark@markzamora.com](mailto:mark@markzamora.com)

February 3, 2016

By email  
Kacie Weeter, Esquire  
Gideon, Cooper  
Suite 1100  
315 Deadrick Street  
Nashville, TN 37238

Re: Tyree adv. Ameridose

Dear

This addresses the pending matter. As we all know, Mr. Tyree's deposition was noticed for and held December 22, 2015. By agreement, the deposition was held at the offices of Branstetter Stranch. Gerard Stranch is obviously a member of the PSC. Mr. Tyree drove from his home in rural Kentucky for the deposition. Before the deposition began, I handed not only discovery responses, but additional documents that Mr. Tyree brought with him to the deposition that day.

During the more than five hour deposition, Mr. Gideon questioned Mr. Tyree about any medical care in the recent past. All counsel learned for the first time that he had been to a doctor in Bowling Green, Kentucky. I learned about it that very day. After taking a short recess, more questions were asked and the deposition was adjourned by agreement. Mr. Gideon asked that we expedite the production of this Kentucky medical professional. The attorneys worked amicably to address this issue, and we agreed that the deposition would be set on a mutually convenient date.

On January 13, 2016 I received the documents from this newly discovered medical provider and sent them that very day via email to counsel. I also let you know that I was not available, doing so via email.

On January 27, 2016 I emailed Mr. Gideon and you that the date unilaterally set for the continuation of the deposition of Mr. Tyree would not work. I then called and spoke with you. We had a cordial conversation. I said in no uncertain terms that I could not attend part two of my client's deposition in Nashville on January 29, 2016. I repeated, as you know, that my client works full time in Kentucky, and less than one week's notice for a day long deposition (again) would not work for him. I then gave you other dates for

the deposition continuation.

On Sunday, you emailed me and informed that you held the deposition at your offices, and that our client did not appear. You, C.J. and I all knew that neither I nor the client could possibly attend that day. You graciously gave me one day to take action you requested.

I emailed you and called you earlier in the week. You told me about the action your client had asked you to take. I then spoke with my client. He will not dismiss his case at this time.

This is not a case where someone simply did not “show up” for a deposition. Mr. Tyree has undergone hours of examination already. He made an accommodation to all concerned by driving from his home in another state to attend the first deposition, even though he was under no obligation to do so.

We are of course willing to proceed with the second part of the deposition. I had, candidly, expected better from your office. I have picked up the telephone twice to let you know my concerns. I was not afforded that same courtesy.

Very truly yours.